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In The Supreme Court of the United States

October Term, 1998

ROBERT A. KARBEL,
PERSONAL REPRESENTATIVE OF THE ESTATE OF
GEORGE F. DRUMMEY AND LYNNE DRUMMEY,
Petitioner,

v.

IN RE: CHARLES A. MUER
ESTATE OF CHARLES A. MUER, DECEASED,
Respondent,

C.A. MUER CORP.,
Defendant.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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19 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

In cases where active fault is alleged against the owner or agent of the owner, should this Court abandon the admiralty court's required two-step inquiry of (1) negligence or unseaworthiness, and (2) the owner's privity or knowledge, where to do so would eliminate the claimant's burden to prove negligence or unseaworthiness and would deprive the owner of the right to seek exoneration under LOLA?

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COUNTER-STATEMENT OF THE CASE

Estate of Muer accepts Karbel's statement of the case with the following exceptions. The factual background is accurate except for footnoote 13, in which Karbel implies that the corporation had settled at the time the district court ruled on Karbel's motion to dismiss the LOLA action. In fact, the corporation was still in the case at the time the district court ruled on that motion in its March 14, 1996 opinion. That opinion is Appendix B to Muer's petition for writ of certiorari. It was not until July, 1996 that the corporation was dismissed pursuant to the settlement. The presence of the corporation as a party to the LOLA action undercuts Karbel's assertion that limitation was an impossibility from the beginning. It was entirely possible, if not likely, that the corporation would have been entitled to limitation even if Mr. Muer had ultimately been found to be negligent and to have had privity or knowledge. The accident happened on a pleasure voyage, and there was no indication that Mr. Muer was acting within the scope of his corporate duties at the time. Thus, the assertion that the corporation must have vicarious liability for Mr. Muer's alleged negligence, while not at issue, is incorrect.

Estate of Muer also does not accept the argumentative assertions in Karbel's introduction. The two-step inquiry is a well established part of LOLA

procedure. Numerous supporting cases are cited in the Sixth Circuit's opinion. Appendix A to Muer's petition, pp. 12a-14a. Karbel urges the Court to do away with this procedure in cases where the owner (or an agent of the owner) is alleged to be actively negligent. Karbel asserts that in such cases limitation of liability is an impossibility, and the claimant ought to be relieved of the burden of proving negligence in the LOLA action. For the reasons discussed in the next section of this brief, Estate of Muer submits there is no basis for abandoning the two-step inquiry or turning around the burden of proof on the negligence issue.

Karbel's assertion that the right to seek exoneration from liability is a judicial expansion of LOLA is incorrect. While the word "exoneration" does not appear in the statute, this Court has recognized from the time it was enacted in 1851, that LOLA was intended to allow the petitioner to seek and obtain a judgment of no liability. The *Benefactor Steamship Co v. Mount*, 103 U.S. 239, 242-243; 26 L Ed 2110 (1880). This is discussed in more detail in the next section of the brief.

Karbel also criticizes the application of LOLA to pleasure craft; yet, arguments that pleasure boats should be excluded from LOLA's coverage have been repeatedly rejected. See, e.g., *Endsley* v. *Young, 872 F2d 176, 177 (6th Cir. 1989).* Until Congress decides to change the act, it should be enforced as written.

REASONS FOR DENYING THE CROSS-PETITION

The Sixth Circuit analyzed this issue and concluded that the two-step inquiry should be followed. Appendix A to petition, pp. 10a-17a. The court cited numerous cases from across the country upholding the two-step inquiry. *Id.*, pp. 12a-14a. These cases, many specifically addressing the argument raised by Karbel here, recognized and enforced the owner's right to exoneration where the claimant fails to meet his or her burden of proving negligence or unseaworthiness.

As to Karbel's assertion that exoneration is not available in this case, the Sixth Circuit rejected the argument in a footnote, noting that exoneration is specifically provided for in Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims, and that owners "'rountinely seek exoneration and limitation of liability in the alternative.'" Appendix A to petition, p. 17a, n.3, quoting *Texaco, Inc,* v. *Williams,* 47 F3d 765, 769 and n. 19 (5th Cir. 1995).

That portion of the Sixth Circuit's decision was unanimous. See Appendix A, p. 26a, in which Judge Contie concurred with that part of the majority's opinion.

Estate of Muer offers the following in specific opposition to the arguments raised by Karbel.

A. THE TWO-STEP INQUIRY PROVIDES A PROPER ALLOCATION OF THE BURDEN OF PROOF, AND KARBEL HAS SUGGESTED NO VALID BASIS FOR ABANDONING IT.

The district court sitting in admiralty had exclusive jurisdiction to decide all issues pertaining to exoneration from or limitation of liability under LOLA. *Hellweg v Baja Boats, Inc*, 818 F Supp 1022, 1024 (E.D. Mich S.D. 1993). It is well-established that a LOLA petition requires the admiralty court to engage in a two-step factual inquiry. *Polly v Estate of Carlson,* 859 F Supp 270, 271 (E.D. Mich, S.D., 1994), *Hercules Carriers, Inc v Florida*, 768 F2d 1558, 1563-64 (11th Cir, 1985), *Farrell Lines, Inc v Jones*, 530 F2d 7 (5th Cir, 1976), *The M/V Sunshine II v Beavin*, 808 F2d 762, 764 (11th Cir, 1987). The first step is to determine what, if any, acts of negligence or conditions of unseaworthiness caused or contributed to the loss. *Id.* If the court determines that no fault on the part of the owner caused or contributed to the accident, complete exoneration from liability should be granted. See, *Petition of Reading*, 169 F Supp 165 (N.D. N.Y., 1959), *aff'd* 271 F2d 959 (2nd Cir, 1959) (Where the evidence showed petitioner-owner was not negligent, petitioner-owner was entitled to an order granting the

petition for complete exoneration.); *In re Cirigliano*, 708 F Supp 101, 103 n. 2 (D.N.J. 1989) ("Complete exoneration is properly granted where there is a finding of no contributory fault"); *M/V Sunshine, II v Beavin*, *supra*, 808 F2d at 764 (If the claimant fails to prove fault, the petitioner will be granted exoneration from liability.); and *Tittle v Aldacosta*, 544 F2d 752, 755 (5th Cir, 1977) (Exoneration is proper where a claimant fails to show that the owner or his crew were negligent or that the vessel was unseaworthy.)

The burden of proving negligence or unseaworthiness on the part of the owner is on the claimant. *Polly v Estate of Carlson, supra*, *Farrell, supra*. A finding of negligence is a prerequisite to addressing privity or knowledge. See *Farrell Lines, Inc v Jones, supra*, 530 F2d at 10, n. 1, quoting 3 *Benedict on Admiralty,* Section 41, p. 5-5.

If it is factually determined that there was some act of negligence or condition of unseaworthiness that caused or contributed to the accident, the second step is to determine whether the owner had knowledge or privity of such act of negligence or condition of unseaworthiness. *Polly v Estate of Carlson, supra* at 274.

B. THE RIGHT TO SEEK EXONERATION IS PART OF LOLA.

Karbel is incorrect in asserting that the right to exoneration is a judicial expansion of LOLA. This Court recognized almost 120 years ago that the right to seek exoneration is an essential part of LOLA. In the *Benefactor, supra*, referring to former Admiralty Rule 56, the Court said the rule:

> "[W]as merely intended to relieve ship-owners from the English rule of practice, which requires them, when they seek the benefit of the law of limited liability, to confess the ship to have been in fault in the collision. This was deemed to be a very onerous requirement; for in many, if not in most cases, it is extremely doubtful which vessel, if either, was in fault; and to require the owners of either to confess fault before allowing them to claim the benefit of the law would go far to deprive them of its benefit altogether. *Hence this Court, in preparing the rules of procedure for a limitation of liability, deemed it proper to allow a party seeking such limitation to contest any liability*

whatever." 103 U.S. at 243. (Emphasis added.)

See also *Sacramento*, 131 F 373, 374 (E.D. Wis. 1904), noting that the right to seek exoneration is "clearly authorized by the admiralty rules (54, 55, 56 and 57) adopted by the Supreme Court to carry out the provisions of the liability limitation act of 1851".

Admiralty Rule 56 as originally promulgated in 1872 expressly authorized an owner to seek a judment of no liability under LOLA. That rule provided:

> "In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest

> the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both." 13 Wall. xiii.

The current rules carry forward this principle and expressly provide that the petitioner may seek exoneration as well as limitation. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F (2). Rule F (5) also recognizes that exoneration is a proper remedy, and that the claimant may contest either the right to exoneration or the right to limitation.

Karbel's cross-petition asks the Court to undo this settled procedure, and to abolish the right to seek exoneration whenever active negligence is alleged against the vessel owner. Karbel says in that instance the claimant should not bear the burden of proving negligence, but the court should just skip over that step. The court in *Polly v. Estate of Carlson*, 859 F Supp. 270, 274, rejected the argument because it would circumvent the two-step inquiry required in LOLA cases and would turn around the burden of proof on the negligence issue. It would also deprive innocent owners who are alleged to be actively negligent of the right to pursue an admiralty court determination of negligence and exoneration from liability, and would thereby defeat the admiralty court's exclusive

jurisdiction:

> "I nevertheless reject *Polly*'s proposed rule *because it would prevent owners from asserting LOLA even in situations where the evidence reveals that their conduct was in all respects prudent.* See, e.g., *M/V Sunshine II v Beavin*, 808 F2d 765 (11th Cir, 1987) (that owner operated boat or was present during accident does not, alone, prevent the owner from invoking LOLA); *In re Cirigliano*, 708 F Supp 101, 103-04 (D.N.J., 1989) (same). I according rule that Arne's presence in the boat is not necessarily fatal to the defendants' right to assert LOLA." 859 F Supp at 274. (Emphasis added.)

The reasoning in *Polly* is persuasive and should apply here. To dismiss the LOLA proceeding based on the mere allegation that Charles Muer was negligent would allow claimant to avoid his burden of proving

negligence and causation. Such a rule would deprive all owners who are alleged to be actively negligent of an admiralty court determination of their right under LOLA not only to seek limitation, but to seek exoneration from liability. See *Petition of Reading*, *supra*, 169 F Supp 165. See also *In Re Cirigliano*, 708 F Supp. 101 and *Petition of M/V Sunshine II*, 808 F 2d 762 (11th Cir. 1987).

Karbel apparently believes the right to seek exoneration is unimportant and easily disposed of, contrary to this Court's rules of procedure which trace their roots back to the first admiralty rules promulgated to implement LOLA's enactment in 1851. Karbel makes much of the point that admiralty jurisdiction does not carry a right to a jury trial, and he speculates that the LOLA procedure might be abused to avoid a jury. That argument should not obscure the fact that in this case Karbel was allowed to proceed in state court based on the conditional stipulations he filed in the district court. This is discussed more in Muer's petition. It is the stipulations procedure that resolves the tension between the admiralty court's exclusive jurisdiction over LOLA and the saving to suitors clause.

Karbel asserts the most pertinent case is *Lake Tankers Corp. v. Henn*, 254 U.S. 147; 77 S. Ct. 1269; 1 L Ed. 2d 1246 (1957). The holding in that case was that in an "adequate fund" situation (i.e., where the amount of the fund meets or exceeds the total value of the claims), LOLA is unnecessary and the case may

proceed in state court. That principle has never been in dispute in this case, but it in no way suggests the two-step procedure should be abandoned, or that a claimant's burden of proving causal negligence or unseaworthiness should be obviated where the LOLA court has jurisdiction.

Finally, Karbel cites two circuit court decisions in support of his position. *Fecht* v. *Makowski,* 406 F2d 721 (5th Cir. 1969), and *Joyce* v. *Joyce,* 975 F2d 379 (7th Cir. 1992). The authority of Fecht is undercut by Judge Godbold's decision in *M/V Sunshine, II, supra,* as discussed by the Sixth Circuit in the present case. Appendix A to petition, pp. 15a-16a. *Joyce, supra,* involved an allegation of negligent entrustment of a motor boat. The court held that since privity or knowledge was, in effect, a required element of the tort of negligent entrustment, LOLA did not provide protection to the owner. *Joyce* does not speak to Karbel's broader argument that an allegation of active negligence against the owner automatically bars a LOLA claim. More important, the court in *Joyce* did not address the two-step inquiry or the owner's right to seek exoneration.

CONCLUSION AND RELIEF REQUESTED

The weight of authority rejects Karbel's argument. Rather than speculating or presuming how allegations of active negligence against an owner may

affect the ultimate question of liability, the district court should properly be required to go through the two-step procedure. If the claimant carries his burden of proof on the negligence issue, privity or knowledge must be addressed. If he fails to do so, the petitioner is entitled to a judgment of exoneration. Estate of Muer respectfully requests this Court to deny the cross-petition for a writ of certiorari.

Respectfully submitted,

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